# 87-1783

NO.

in the

# Supreme Court

of the

# United States

October Term, 1987

WILLIAM A. BRACKENRIDGE,

*Appellant,*

*vs.*

AMETEK, INC., AMERICAN MACHINE AND METAL CO., TROY EQUIPMENT, INC. and BARING INDUSTRIES, INC.,

*Appellees,*

On Appeal From
The Supreme Court of Florida

## JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED FOR REVIEW

Whether a statute of repose can constitutionally be applied retroactively to bar causes of action which accrued and were filed after the statute was declared unconstitutional by a state's highest court and before the state reverses itself and declares the statute constitutional.

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## OPINIONS BELOW

The opinion of the Florida Supreme Court is reported as *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987), and appears in the appendix at (App. 2a). The opinion of the Florida Third District Court of Appeal is reported as *Brackenridge v. Ametek, Inc.*, at 503 So.2d 363 (Fla. 3d DCA 1987) (per curiam), and appears at (App. 1b). The original opinion of the Florida Eleventh Judicial Circuit Court is unreported and appears at (App. 1a).

## SIMILAR CASE PENDING

The Appellant, William Brackenridge, advises this Court that it is aware of a similar case pending on appeal to the United States Supreme Court, *Clausell v. Hobart Corp.*, Docket No. 87-1400, filed on March 21, 1988 which involves the same legal issue.

## JURISDICTION

The opinion of the Florida Supreme Court declaring that Florida Statute §95.031(2) was constitutional when applied retroactively to the Appellant, William Brackenridge, was entered on December 3, 1987, rehearing denied on January 28, 1988. (App. 2a, App. 2b). A Notice of Appeal to this Court was filed on March 29, 1988 (App. 4). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Fourteenth Amendment, *Constitution of the United States:*

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The statute of repose—§95.031(2), *Fla. Stat.* (1975):

> (2) Actions for products liability under s.95.11(3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s.95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered.

## STATEMENT OF THE CASE

This action for product liability draws in question the validity of the retroactive application of Florida's product liability statute of repose as revived by the Florida Supreme Court in the case of *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986). The Appellant attacks the constitutionality of said statute as applied to him, as violative of his Fourteenth Amendment Due Process rights.

In September of 1967 the laundry extractor involved in this litigation was manufactured and distributed by the Appellees, Ametek, Inc., American Machine and Metal Co., Troy Equipment, Inc. (hereinafter collectively referred to as Ametek) and Baring Industries, Inc. In 1974 the Florida legislature enacted a product liability statute of repose which went into effect in 1975. §95.031(2) *Fla. Stat.* (1975). The statute provided that an action for product liability must be commenced no later than twelve years after the date of delivery of the completed product to the original purchaser. *Id.*

On December 11, 1980, the Florida Supreme Court held the statute of repose was unconstitutional as it barred access to courts to litigants injured by products more than twelve years after the delivery date, in violation of Article I, Section 21, of the Florida Constitution. *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980). *Battilla* involved a plaintiff like Brackenridge who was injured more than twelve years after the delivery of the defective product. The court held the statute unconstitutional as applied

to the plaintiff, as it completely barred the plaintiff's cause of action before it accrued. *Battilla* amended the statute of repose to provide that it was null and void as to plaintiffs who were injured by defective products more than twelve years after the delivery date of the defective product.

On December 14, 1982, the Appellant, William A. Brackenridge's arm was traumatically amputated by the Appellees' laundry extractor, fifteen years after its delivery date. On December 11, 1984 Brackenridge filed suit in the Florida Eleventh Circuit Court alleging negligence and strict liability.

On August 29, 1985, the Florida Supreme Court reversed its earlier decision in *Battilla* and declared that the statute of repose was *constitutional*, even as to injuries occuring more than twelve years after product delivery. *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985). It did not state whether the statute of repose applied retroactively to accrued causes of action.

Throughout the proceedings below, Brackenridge has consistently argued that the statute of repose could not be applied to bar his cause of action as it would violate his federal due process rights. Brackenridge's basic argument is that on the day his arm was mutilated by the unguarded laundry extractor his right to his day in court to pursue damages against the manufacturer and distributor vested, and once vested, the state of Florida could not deprive him of that right without due process.

In the trial court, the Appellant filed a memorandum of law in support of his motion for summary judgment and in opposition to the Appellees' motion for summary judgment arguing that "Florida Statute §95.031(2) is unconstitutional as applied to this case." (R. 278-332). The trial court rejected his challenge and entered summary judgment against Brackenridge. (R. 468).

In his brief to the Florida Third District Court of Appeal Appellant reiterated that "Retroactive application [of the Florida product liability statute of repose] violates Brackenridge's Federal and State constitutional rights of due process." (Appellant's Initial Brief at 17). He argued that "The minimum due process protection which must be afforded Brackenridge is that the State's high court cannot extinguish a pending tort claim by retroactive application of a new law affecting substantive rights." (Appellant's Reply Brief at 4).

The district court of appeal affirmed, based on the companion case of *Shaw v. General Motors Corp.*, 503 So.2d 362 (Fla. 3d DCA 1987), which was aruged on the same day as *Brackenridge*. The Florida Third District Court of Appeal certified the issues to the Florida Supreme Court.

In the Florida Supreme Court the Appellant again challenged the constitutionality of retroactively applying the statute of repose. Brackenridge argued "Retroactive application of *Pullum* would also impair Federal due process rights," and "[t]he same constitutional dictates which prohibit retroactive legislation also prohibit the judiciary from impairing vested property rights." (Brief of Petitioner at 13-15).

In *Brackenridge*, the Florida Supreme Court expressly held that retroactive application of the statute of repose to Brackenridge did not deprive Brackenridge of property or contract rights. The court stated,

> In the instant case Brackenridge does not fall within the exception to the general rule. He was not deprived of a property or contract right acquired in reliance upon this Court's decision in *Battilla*. His accident was fortuitous and did not occur as a result of conduct prompted by *Battilla*. Moreover, he did not act in reliance on the *Battilla* declaration of the unconstitutionality of section 95.031(2) and thereby miss the limitation deadline for filing suit with which he could have otherwise complied. His expenditure of funds in the prosecution of the suit prior to *Pullum* did not constitute the acquisition of property or contract rights. *See Eddings v. Volkswagenwerk, A.G.*, 635 F.Supp. 45 (N.D. Fla. 1986). Since there was no detrimental reliance upon *Battilla*, the general rule dictates that *Pullum* be given retrospective application so as to bar his claim. *Accord Hampton v. A. Duda & Sons, Inc.*, 511 So.2d 1104 (Fla. 5th DCA 1987).

*Brackenridge*, 517 So.2d at 669 (1987).

In the companion case now pending before this Court, *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987), the Florida Supreme Court expressly denied the claim that retroactive application of the product liability

statute of repose to causes of actions which had arisen and were pending while the statute was void violated due process rights. *Clausell* was decided on the same day as *Brackenridge* and addressed the same federal constitutional challenges raised by Brackenridge.

## SUBSTANTIAL FEDERAL QUESTION

The substantial nature of the federal question involved in this appeal is discussed at length in the jurisdictional statement filed in *Clausell v. Hobart*, Case No. 87-1400.

Florida deprived Brackenridge of his federal due process rights by retroactively reviving a null and void statute so as to terminate his tort action which had accrued and was filed when the statute was "unconstitutional." A multitude of cases were in various stages of litigation in the Florida state and federal district courts when *Pullum* was decided, which cases have been dismissed regardless of the severity of the plaintiff's injury, the amount of time and money invested in the plaintiff's case, or the posture of the litigation. The statute of repose had not been enacted when the defendants manufactured and distributed the defective product, it was null and void pursuant to *Battilla* at the time Brackenridge was injured and filed suit, and was repealed while his appeal was pending. To deny him his day in court because he "fell between the cracks" violates his constitutional right to due process. The laws and remedies of the Constitution were designed to protect individuals from state infractions of federal rights and the responsibility for protecting those rights cannot be left to the states. *Chapman v. State*, 386 U.S. 18, *rehrg. denied* 386 U.S. 987 (1967).

The Supreme Court emphasized the value of this right in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). "[T]he respondent's potential redress for his allegedly serious injury—an injury that may significantly undercut his future earning power—is entitled to similar protection." *Id.* at 108.

The decision of the Florida Supreme Court that retroactive application of the statute of repose to bar already accrued causes of action, "does not deprive Brackenridge of a property right" conflicts with federal court decisions. *Brackenridge*, 517 So.2d at 668. In *Hartford Fire Insurance Co. v. Lawrence*, 740 F.2d 1362 (6th Cir. 1954), the court held that "A litigant has no vested property right in a cause of action *until it accrues.*" *Id.* at 1367. (Emphasis supplied).

This court has recognized that a state tort claim is a "species of property" protected by the Due Process Clause—*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1980); *Martinez v. California*, 444 U.S. 277, 281-282 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

The Supreme Court's mandatory appellate jurisdiction to review state court decisions which expressly or necessarily uphold the validity of a state statute by enforcing it despite a claim of repugnance to the Constitution of the United States should be exercised here by accepting plenary review of this appeal, to insure that the state acknowledges the binding force and effect of controlling federal law. *New Orleans Land Co. v. Brott*, 263 U.S. 97 (1923).

## CONCLUSION

The appeal involves a denial of due process as guaranteed by the Fourteenth Amendment. Plenary review should be granted.

Respectfully submitted,

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April 26, 1988

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing jurisdictional statement and appendix was mailed this 27th day of April, 1988 to Stroock & Stroock & Lavan, Attorneys for Ametek, Inc., 3300 S.E. Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; Linda Koenisberg, Esquire, Law Offices of James O. Nelson, Attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard; William G. Liston, Esquire, Stephen R. Berger, P.A., Attorneys for Baring, 8525 S.W. 92 Street, Suite B-5, Miami, Florida 33156 and to The Honorable Robert A. Butterworth, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32301.

George C. Vogelsang

GEORGE C. VOGELSANG

# Appendix

## APPENDIX 1.a

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 84-47740(21)

WILLIAM A. BRACKENRIDGE,

*Plaintiff,*

*vs.*

AMETEK, INC., AMERICAN MACHINE AND METAL CO., TROY LAUNDRY MACHINE CO., TROY EQUIPMENT, INC., and BARING INDUSTRIES, INC.,

*Defendants.*

### ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY FINAL JUDGMENT

### ENTRY OF SUMMARY FINAL JUDGMENT

THIS CAUSE having come before this Court the Motion for Partial Summary Judgment of plaintiff; and the Motion for Final Summary Judgment of defendant, BARING INDUSTRIES, INC., and, by stipulation, defendants AMETEK, INC., AMERICAN MACHINE AND METAL CO., TROY LAUNDRY MACHINE CO., and TROY EQUIPMENT, INC.; and the Court having heard argument of counsel, having reviewed the papers filed, and being full advised in the premises, it is hereby

ORDERED AND ADJUDGED that:

1. Defendants' Motion for Summary Final Judgment is granted, and plaintiff's Motion for Partial Summary Judgment is denied.

2. Summary Final Judgment is entered in favor of Defendants, AMETEK, INC., AMERICAN MACHINE AND METAL CO., TROY LAUNDRY MACHINE CO., TROY EQUIPMENT INC., and BARING INDUSTRIES, INC., and against Plaintiff, WILLIAM A. BRACKENRIDGE, on the basis of *Pullum v. Cincinnati, Inc.*, ____ So. 2d ____ (Fla.1985) (10FLW 428).

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 3 day of Dec., 1985.

JOHN A. TANKSLEY, Circuit Judge
CIRCUIT JUDGE

Copies furnished:

Linda Koenigsberg, Esq.
George Vogelsang, Esq.
David C. Pollack, Esq.

## APPENDIX 1.b

[363] William A. BRACKENRIDGE,

*Appellant,*

*v.*

AMETEK, INC. and Baring Industries, Inc.,

*Appellees.*

**No. 85-2775.**

District Court of Appeal of Florida,
Third District.

Feb. 10, 1987.

An Appeal from the Circuit Court for Dade County; John A. Tanksley, Judge.

Beth Tyler Vogelsang and George C. Vogelsang, Miami, for appellant.

Stroock, Stroock & Lavan and David C. Pollack and Ricardo Torres, Jr., James O. Nelson, Steven R. Berger and William G. Liston, Miami, for appellees.

Before HUBBART, BASKIN and DANIEL S. PEARSON, JJ.

PER CURIAM.

Affirmed on the authority of *Shaw v. General Motors Corp.*, 503 So.2d 362 (Fla. 3d DCA 1987). As in *Shaw*, we certify to the Supreme Court of Florida the following questions as being of great public importance:

[364] I. Should the legislative amendment of Section 95.031(2), Florida Statutes (1983), abolishing the statute of repose in product liability actions, be construed to operate retrospectively as to a cause of action which accrued before the effective date of the amendment?

II. If not, should the decision of *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla.1985), *appeal dismissed*, ____ U.S. ____, 106 S.Ct. 1626, 90 L.Ed.2d 174 (1986), which overruled *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla.1980), apply so as to bar a cause of action that accrued after the *Battilla* decision but before the *Pullum* decision?

Affirmed.

## APPENDIX 1.c

[1275] Alberto CLAUSELL, et al.,

*Petitioners,*

*v.*

HOBART CORPORATION,

*Respondent.*

**No. 70566.**

Supreme Court of Florida.

Dec. 3, 1987.

Appeal was taken from decision of the Circuit Court, Dade County, Phillip W. Knight, J., in product liability action. The District Court of Appeal, 506 So.2d 1160, affirmed and certified questions of great public importance. Application for review was granted. The Supreme Court, Grimes, J., held that plaintiff had no vested right in cause of action and, therefore, would suffer no deprivation of due process by retroactive application of Supreme Court opinion.

Questions answered.

**Constitutional Law —253(4)**

Plaintiff had no vested right in cause of action and, therefore, would suffer no deprivation of due process by

retroactive application of Supreme Court opinion, which upheld validity of statute of repose in product liability action and which overruled prior decision finding statute unconstitutional. U.S.C.A. Const.Amends. 5, 14; West's F.S.A. §§ 95.031, 95.031(2).

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Joel P. Perwin of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., and Spence, Payne, Masington, Grossman & Needle, P.A., Miami, for petitioners.

James E. Tribble and Anthony D. Dwyer of Blackwell, Walker, Fascell & Hoehl, Miami, for respondent.

GRIMES, Justice.

We review *Clausell v. Hobart Corp.*, 506 So.2d 1160 (Fla. 3d DCA 1987), to answer three certified questions of great public importance. Art. V, § 3(b)(4), Fla.Const. The certified questions are as follows:

> I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95-031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT?

II. IF NOT, WHETHER THE DECISION OF *PULLUM v. CINCINNATI, INC.*, 476 SO.2D 657 (FLA.1985), *APPEAL DISMISSED*, 475 U.S. 1114, 106 S.CT. 1626, 90 L.ED.2D 174 (1986), WHICH OVERRULED *BATTILLA v. ALLIS CHALMERS MFG. CO.*, 392 SO.2D 874 (FLA.1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION?

III. WOULD THE APPLICATION OF *PULLUM*, TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION, DEPRIVE THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION?

*Id.* at 1160–61. We recently answered the first question in the negative and the second question in the affirmative in *Melendez v. Dreis & Krump Manufacturing Co.*, 515 So.2d 735 (Fla.1987).

With reference to the third certified question, Clausell argues that the retroactive application of *Pullum* to his cause of action violates his right to due process under the United States Constitution. We find this claim unfounded. Several years ago in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438

U.S. 59, 88, 98 S.Ct. 2620, 2638, 57 L.Ed.2d 595 (1978), the United States Supreme Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common [1276] law.' " *See also Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307, 1309 (5th Cir.), *cert. denied,* 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 677 (1978) ("it is well settled that a plaintiff has no vested right in any tort claim for damages under state law"). More recently, in *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), the Court acknowledged that a cause of action is a species of property but pointed out that the state remained free to create substantive defenses or immunities for use in adjudication.

The Federal District Court in *Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F.Supp. 1144 (S.D.Fla.1986), rejected the very argument advanced by Clausell when it stated:

> While the instant Plaintiff correctly posits that a statute may not be retroactively applied to deprive a party of a vested right, such a situation simply does not exist here. "A statute is not unconstitutionally retrospective in its operation unless it impairs a substantive, vested right. A substantive vested right is an immediate right of present enjoyment, or a present fixed right of future enjoyment." *In re Will of Martell,* 457 So.2d 1064, 1067 (Fla. 2d DCA 1984). "To be vested a right must be *more than a mere expectation based on an*

> *anticipation of the continuance of an existing law;* it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Division of Workers' Compensation v. Brevda,* 420 So.2d 887, 891 (Fla. 1st DCA 1982) (emphasis added). The Plaintiff in the instant case had no vested contract or property right prior to the *Pullum* decision; instead Plaintiff was merely pursuing a common law tort theory to recover damages.

631 F.Supp. at 1149.

Another federal district court reached the same conclusion in *Eddings v. Volkswagenwerk, A.G.,* 635 F.Supp. 45 (N.D.Fla.1986), when it said:

> *Pullum,* receding from *Battilla,* held the statute was not unconstitutional. No cause of action was created by the statute and *Battilla* vested in plaintiffs no cause of action. It removed the bar of the statute to plaintiffs' assertion of a cause of action. But plaintiffs had, at most, a mere expectation that they had a cause of action they could pursue, and a subsequent decision, holding the statute to be constitutional, could not and does not deprive them of any vested rights.

*Id.* at 47.

Section 95.031 provided a defense to a cause of action rather than creating a cause of action. In *Battilla* the court simply held section 95.031(2) unconstitutional as

applied to the facts of that case. When *Pullum* was decided, the statute became valid *ab initio* and was restored to its operative force. Since Clausell had no vested right in his cause of action, he suffered no deprivation of due process under the United States Constitution. Consequently, we answer the third certified question in the negative and approve the decision of the district court of appeal.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT and KOGAN, JJ. concur.

## APPENDIX 2.a

[667] William A. BRACKENRIDGE,

*Petitioner,*

*v.*

AMETEK, INC. and Baring Industries, Inc.,

*Respondents.*

**No. 70099.**

Supreme Court of Florida.

Dec. 3, 1987.

Rehearing Denied Jan. 28, 1988.

Plaintiff brought products liability suit more than 12 years after product's delivery to original purchaser. The District Court of Appeal certified question of great public [668] importance, 503 So.2d 363. The Supreme Court, Grimes, J., held that state Supreme Court decision overruling prior decision by upholding constitutionality of 12-year products liability statute of repose could be retroactively applied to bar as untimely products liability suit commenced after prior decision.

Decision approved.

1. **Courts —100(1)**

Where property or contract rights have been acquired under and in accordance with previous statutory construction of Supreme Court, such rights should not be destroyed by giving retrospective operation to subsequent overruling decision.

2. **Courts —100(1)**

State Supreme Court decision overruling its prior decision by upholding constitutionality of 12-year products liability statute of repose could be retroactively applied to bar as untimely products liability suit commenced after prior decision; plaintiff did not act in reliance on prior decision and thereby miss limitation deadline for filing suit with which he could have otherwise complied, and he was not deprived of property or contract right acquired in reliance upon prior decision. West's F.S.A. § 95.031(2).

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Beth Tyler Vogelsang of the Vogelsang Law Firm, Miami, for petitioner.

David C. Pollack and Ricardo Torres, Jr. of Stroock & Stroock & Lavan, Miami, for Ametek, Inc.

Law Offices of James O. Nelson, and Steven R. Berger and William G. Liston of Steven R. Berger, P.A., Miami, for Baring Industries.

GRIMES, Justice.

Pursuant to article V, section 3(b)(4) of the Florida Constitution, we review the decision of the Third District Court of Appeal upon questions certified to be of great public importance. *Brackenridge v. Ametek, Inc.*, 503 So.2d 363 (Fla. 3d DCA 1987).

Brackenridge was injured by a laundry extractor more than twelve years after its delivery to the original purchaser. In affirming the dismissal of his product liability action, the court certified the following questions:

> I. SHOULD THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT?
>
> II. IF NOT, SHOULD THE DECISION OF *PULLUM v. CINCINNATI, INC.*, 476 SO.2D 657 (FLA.1985), *APPEAL DISMISSED*, [475] U.S. [1114], 106 S.CT. 1626, 90 L.ED.2D 174 (1986), WHICH OVERRULED *BATTILLA v. ALLIS CHALMERS MFG. CO.*, 392 SO.2D 874 (FLA.1980), APPLY SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION?

*Brackenridge*, 503 So.2d at 364. We recently answered the first question in the negative and the second question in the affirmative in *Melendez v. Dries & Krump Manufacturing Co.*, 515 So.2d 735 (Fla.1987).

[1] Because it was not specifically discussed in the *Melendez* opinion, we will address the contention that in spite of this Court's opinion in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla.1985), upholding the constitutionality of section 95.031(2), Brackenridge is entitled to relief because he relied upon our earlier decision of *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla.1980), which declared the statute unconstitutional as applied. As stated in *Melendez*, it is a general rule that a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its operation unless declared by the opinion to [669] have prospective effect only. However, there is an exception to the rule which provides that where property or contract rights have been acquired under and in accordance with a previous statutory construction of the supreme court, such rights should not be destroyed by giving the retrospective operation to a subsequent overruling decision. *Department of Revenue v. Anderson*, 389 So.2d 1034 (Fla. 1st DCA 1980).

The application of the exception to the rule is illustrated in *Florida Forest & Park Service v. Strickland*, 154 Fla. 472, 18 So. 2d 251 (1944), in which a workers' compensation claimant had appealed an adverse decision to the circuit court in accordance with existing law. After the circuit court had ruled in favor of the claimant but while the case was still on appeal,

the supreme court had overruled a prior decision and held that those seeking review of decisions of deputy commissioners in workers' compensation cases must first exhaust their remedies by way of appeal to the Florida Industrial Commission. The *Strickland* court recognized that the claimant had relied on existing procedures when he appealed to the circuit court and refused to penalize him for failing to appeal to the Florida Industrial Commission when he had no reason to know that he should do so.

[2] In the instant case Brackenridge does not fall within the exception to the general rule. He was not deprived of a property or contract right acquired in reliance upon this Court's decision in *Battilla.* His accident was fortuitous and did not occur as a result of conduct prompted by *Battilla.* Moreover, he did not act in reliance on the *Battilla* declaration of the unconstitutionality of section 95.031(2) and thereby miss the limitation deadline for filing suit with which he could have otherwise complied. His expenditure of funds in the prosecution of the suit prior to *Pullum* did not constitute the acquisition of property or contract rights. *See Eddings v. Volkswagenwerk, A.G.,* 635 F.Supp. 45 (N.D.Fla.1986). Since there was no detrimental reliance upon *Battilla,* the general rule dictates that *Pullum* be given retrospective application so as to bar his claim. *Accord Hampton v. A. Duda & Sons, Inc.,* 511 So.2d 1104 (Fla. 5th DCA 1987).

We approve the decision of the district court of appeal.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, BARKETT and KOGAN, JJ., concur.

## APPENDIX 2.b

Supreme Court of Florida

THURSDAY, JANUARY 28, 1988

**CASE NO. 70,099**

District Court of Appeal,
3d District—No. 85-2775

WILLIAM A. BRACKENRIDGE,

*Petitioner,*

*v.*

AMETEK, INC., et al.,

*Respondents.*

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for petitioner, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. John A. Tanksley, Judge
Hon. Richard P. Brinker, Clerk

Bety Tyler Vogelsang, Esquire
James O. Nelson, Esquire
Steven R. Berger, Esquire
Ricardo Torres, Jr., Esquire

A True Copy

TEST

(Seal Supreme Court of State of Florida)

By: /s/ Tanya Carrall
Deputy Clerk
Sid L White
Clerk Supreme Court.

## APPENDIX 3.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70-099

WILLIAM A. BRACKENRIDGE,

*Petitioner,*

*vs.*

AMETEK, INC. and BARING INDUSTRIES, INC.,

*Respondents.*

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that the Petitioner, WILLIAM A. BRACKENRIDGE, hereby appeals to the Supreme Court of the United States from the final order of the Florida Supreme Court entered herein on December 3, 1987, rehearing timely filed on December 18, 1987 and denied on January 28, 1988.

This appeal is taken pursuant to 28 USC §1257(2).

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 29th day of March, 1988 to Stroock & Stroock & Lavan, Attorney for Respondent, Ametek, Inc., 3300 S. E. Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131; Linda Koenisberg, Esquire, Law Offices of Jams O. Nelson,

Attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard, Miami, Florida 33131 and William G. Liston, Esquire, Stephen R. Berger, P.A. Attorneys for Baring, 8525 S. W. 92 Street, Suite B-5, Miami, Forida 33156.

THE VOGELSANG LAW FIRM
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By:_____
BETH TYLER VOGELSANG

Supreme Court, U.S.
FILED
MAY 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1783

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

WILLIAM A. BRACKENRIDGE,

*Appellant,*

*vs.*

AMETEK, INC.
and
BARING INDUSTRIES, INC.

*Appellees,*

**On Appeal From**
**The Supreme Court of Florida**

## AMETEK'S MOTION TO DISMISS APPEAL

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## QUESTION PRESENTED

Whether a litigant's reliance on a state common law rule is a vested property right, precluding application of a change in that law to his pending cause of action.

## LIST OF ALL PARTIES

The proper appellees are Ametek, Inc. ("Ametek") and Baring Industries, Inc. Appellant unnecessarily lists American Machine and Metal Co. ("American Machine") and Troy Equipment, Inc. ("Troy Equipment") as parties to this appeal.[1]

In the proceedings below before the Florida Third District Court of Appeal and the Supreme Court of Florida, American Machine and Troy Equipment were not listed as parties in the style of the case, and were not mentioned by any of the parties in their briefs or by either of the courts in their opinions. Any reference to them here is superfluous.

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1. Appellant named American Machine and Troy Equipment defendants in its Second Amended Complaint, alleging them to be Ametek's predecessors. (R. 125). In its Answer to Second Amended Complaint, Ametek indicated that American Machine was its former name and that Troy Laundry Machinery was the name of one of its former divisions. Ametek denied having any connection to Troy Equipment. (R. 256).

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## STATEMENT OF THE CASE

In 1975, the Florida legislature enacted Fla. Stat. § 95.031(2), the statute of repose, providing that products liability suits had to be commenced within twelve years after delivery of the product to its original purchaser.

Ametek manufactured, and in or about September 1967 delivered to its original purchaser, a commercial laundry machine known as an extractor.[2] Appellant alleges he was injured while operating the extractor in December 1982, more than 15 years after the extractor's delivery to its original purchaser. Petitioner's suit was filed in December 1984, more than 17 years after the extractor's delivery and well beyond the statute of repose twelve year period. *See* appellant's Jurisdictional Statement at 3-4.

In 1980, the Supreme Court of Florida held in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980), that "as applied to this case, section 95.031 denies access to the courts under Article I, Section 21, Florida Constitution."[3] Appellant filed his suit against Ametek in 1984, apparently under the impression that, because of *Battilla*, his cause of action was not barred by the statute of repose.

In 1985, while appellant's suit against Ametek was pending, the Supreme Court of Florida, in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), "receded" from *Battilla*, confirming

---

2. An extractor spins wet clothes to remove excess water prior to their being placed in a dryer.

3. Article 1, Section 21, Florida Constitution, the access to courts provision, provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

that the statute of repose was, under the Florida Constitution, a permissible exercise of a legislative prerogative.

> The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031(2) in his dissenting opinion in *Battilla*, correctly reasoned as follows:
>
> * * * *
>
> I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers.

476 So.2d at 659-60

Relying on *Pullum*, the trial court (R. 468), Third District Court of Appeal,[4] and Supreme Court of Florida,[5] held that appellant's cause of action against Ametek was barred by the statute of repose. All three courts rejected appellant's contention that applying *Pullum* to his pending action deprived him of a vested property right under the Florida Constitution.

As shown below, appellant did not raise any issues under the United States Constitution before the Supreme Court of Florida, and that court's holding was based solely on Florida law.

---

4. *Brackenridge v. Ametek, Inc.*, 503 So.2d 363 (Fla. 3d DCA 1987).

5. *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987).

## REASONS WHY APPEAL SHOULD BE DISMISSED

### I. BECAUSE APPELLANT DID NOT HAVE A VESTED PROPERTY RIGHT IN HIS TORT CLAIM, THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The sole basis of this appeal is appellant's contention that his cause of action against Ametek was a vested property right which could not be retroactively barred by *Pullum*. Appellant argues that such a result violates the due process clause of Article XIV, Section 1 of the United States Constitution. *See* appellant's Jurisdictional Statement at 7-8. This is not the law.

In *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 420 (1919), this Court recognized that "no person has a vested right entitling him to have . . . any . . . rules of law remain unchanged for his benefit." More recently, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, (1978), the Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law'." 438 U.S. at 88 n.32. *See also, Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) ("It is well settled that a plaintiff has no vested right in any tort claim for damages under state law."); *Silver v. Silver*, 280 U.S. 117, 122 (1929) ("We need not . . . elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . .").

Appellant's reliance on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), in support of his position that his cause of action is an absolute property right is misplaced. *Logan* noted that "a cause of action is a species of property . . . ." 455 U.S. at 428 (emphasis added). But *Logan* also ruled that although a cause of action may be a "species" of property, it can be abolished by a state.

> Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs. The Court held as much in *Martinez v. California* . . . where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity *arguably* did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels.

455 U.S. at 432 (emphasis added).

Moreover, *Martinez v. State of California*, 444 U.S. 277 (1980), on which *Logan* relied, undermines appellant's argument here. In *Martinez*, plaintiff's daughter was murdered by a parolee with a long history of prior violent crimes. Plaintiff sued the state officials responsible for the release of the parolee, alleging they were negligent and liable for the wrongful death of his daughter. Plaintiff's complaint was dismissed on the basis of a California statute immunizing public employees from liability arising from their decisions whether to parole criminals. Plaintiff then challenged the constitutionality of the statute, arguing that by abolishing his common law cause of action for wrongful death, the state deprived him of property without due process.

*Martinez* presented the Court with compelling equities. In fact, the Court observed that based on the record, it assumed that defendants "knew, or should have known that the release of Thomas created a clear and present danger that such an incident would occur." 444 U.S. at 280. Nevertheless, the Court found that although a common law cause of action may be a "species" of property, the abolition of that cause of action does not offend due process or otherwise raise a substantial federal question.

> Nor can the statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

444 U.S. at 281-82.

The Court's view that the abolition of the plaintiff's cause of action did not violate due process is further illustrated by its application of the rationality test — the lowest level of constitutional scrutiny:

> We have no difficulty in accepting California's conclusion that there "is a rational relationship between the state's purposes and the statute". . . . Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that

> it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination.

444 U.S. at 282-83.

In *Pullum*, the Supreme Court of Florida determined that the legislature "reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability . . . ." 476 So.2d 659. That finding satisfies the rationality test and disposes of appellant's assertion that there is a substantial federal question here.

Appellant's reliance on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), is inapposite. In *Chevron*, plaintiff was injured while working on an offshore drilling rig, and brought suit against his employer more than one year later. At the time, admiralty law governed his suit.

While the suit was pending, the Supreme Court decided *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969), which overruled prior federal law and held that state law, not admiralty law, governed suits such as plaintiff's. The applicable state law contained a one year statute of limitations; admiralty law embraced the doctrine of laches, and had no statute of limitations. The issue in *Chevron* was whether the state statute of limitations should be retroactively applied to bar plaintiff's suit.

*Chevron* did not, as appellant implies, find that plaintiff's pending cause of action was an absolute property right which could not be retroactively abolished by the new statute of limitations. Rather than looking to the due process clause, the *Chevron* Court relied on a three part balancing test, weighing competing policy considerations.

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation . . . Finally, we have weighed the inequity imposed by retroactive application . . . ."

404 U.S. at 106-07.

The two Florida federal district courts addressing the due process issue appellant raises, and applying the *Chevron* test to facts analogous to those here, have concluded that retroactive application of *Pullum* is appropriate and constitutionally permissible. *See Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F.Supp. 1144, 1150-51 (S.D.Fla. 1986); *Eddings v. Volkswagenwerk, A.G.*, 635 F.Supp. 45, 47-48 (N.D.Fla. 1986). Significantly, *Lamb* and *Eddings* both ruled that the *Chevron* test only applies to the retroactivity of a federal decision involving federal law, and not to the retroactivity of a state decision involving state law. The latter issue, both courts agreed, is purely one of state law and does not raise a substantial federal question. *See Lamb* 631 F.Supp. at 1151-52; *Eddings*, 635 F.Supp. at 48.[6]

Moreover, the *Chevron* test has been used retroactively to apply a new statute of limitations and dismiss pending claims. In *DelCostello v. International Brotherhood of*

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6. As additional support for its conclusion that retroactive application of *Pullum* does not raise due process issues, the *Lamb* court cited to the several cases where this Court has "dismissed, for want of a federal question, several appeals of state court decisions upholding statutes of repose." 631 F.Supp. at 1151.

*Teamsters*, 462 U.S. 151 (1983), this Court overruled prior precedent and held that a six month statute of limitations governed certain actions by employees under Section 301 of the Labor Management Relations Act of 1947. Using the *Chevron* test, *DelCostello* was applied retroactively to bar pending claims in *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, 469 U.S. 916 (1984), and *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983). Similarly, retroactive application of *Pullum* to bar appellant's cause of action does not offend the due process clause.

## II. APPELLANT FAILED TO RAISE BELOW, AND THUS DID NOT PRESERVE, ANY FEDERAL QUESTION.

Not only should this appeal be dismissed for its failure to present a substantial federal question, but it should also be dismissed because appellant did not raise his federal due process argument before the Supreme Court of Florida, nor did that court rule on the issue.

This Court will not consider federal questions not presented and decided by the state's highest court below:

> In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons

> that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

*McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). *See also, Heath v. Alabama*, 474 U.S. 82, 87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, . . . the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review."). Here, appellant's due process claims were neither pressed nor passed upon in the Supreme Court of Florida.

In order to press a federal question in a state's highest court, a party must "adequately" and "squarely" present that issue. *Board of Directors of Rotary International v. Rotary Club of Duarte*, ____ U.S. ____, 107 S.Ct. 1940, 1948 (1985). A "casual reference" to a federal question "is insufficient to inform a state court that it has been presented with a claim subject to" this Court's appellate jurisdiction. 107 S.Ct. at 1948 n.9.

Appellant never pressed a federal question in the Supreme Court of Florida. Although appellant's brief contained several references to "property rights" and "due process," no attempt was made to differentiate between the Florida or United States Constitutions.[7] Moreover, the brief does not mention, quote, or cite to Article XIV of the United States Constitution.

The only place appellant can arguably claim to have hinted at a federal issue is on page 13 of his brief, where he

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7. Article 1, Section 9 of the Florida Constitution contains a due process clause providing, in relevant part:

> No person shall be deprived of life liberty, or property without due process of law. . . .

argued, almost as an afterthought, that "[r]etroactive application of *Pullum* would also impair federal due process rights." He then cites *Chevron*, 404 U.S. 97, not a constitutional case, and *Logan*, 455 U.S. 422, which held that a common law cause of action could be abolished by the state. This cursory allusion to federal due process did not "adequately" and "squarely" present the federal due process issue before the Supreme Court of Florida, and amounts to nothing more than the "casual reference" to a federal question this Court has determined is insufficient to invoke its appellate jurisdiction. *Board of Directors of Rotary International v. Rotary Club of Duarte, supra*, 107 S.Ct. at 1948.

Appellant is in the same position as the unsuccessful petitioner in *Webb v. Webb*, 451 U.S. 493 (1981). There, petitioner obtained a Florida judgment awarding her custody of her child. Thereafter, the Georgia Supreme Court awarded custody to the child's father. Petitioner appealed to this Court, arguing that Georgia's refusal to abide by the prior Florida judgment violated the full faith and credit clause of Article XIV, Section 1 of the United States Constitution.

This Court held that the petitioner's general references to "the full faith and credit" clause were insufficient to apprise the state courts that she was raising a federal constitutional issue.

> Although petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution . . . .
>
> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole

> shows either expressly or by clear implication, that the federal claim was adequately presented in the state system.

451 U.S. at 496-97. This Court found, from the record, that it was unclear whether the petitioner's use of "full faith and credit" was a reference to the United States Constitution, or to a uniform child custody act adopted by Florida and Georgia pursuant to which, arguably, Georgia should have recognized the Florida judgment; Georgia's constitution does not contain a full faith and credit clause.

Appellant must also show that the Florida Supreme Court passed upon the federal due process issue. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. at 434; *Heath v. Alabama*, 474 U.S. at 87. It did not.

In *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987), the Supreme Court of Florida decided the two issues certified to it by the Third District Court of Appeal:

> I. Should the Legislative Amendment of Section 95.031(2), Florida Statutes (1983), abolishing the statute of repose in product liability actions, be construed to operate retrospectively as to a cause of action which accrued before the effective date of the amendment?
>
> II. If not, should the decision of *Pullum* . . . apply so as to bar a cause of action that accrued after the *Battilla* decision but before the *Pullum* decision?

517 So.2d at 668.

In deciding these two state law issues, the Supreme Court of Florida rejected appellant's contention that his pending cause of action was a property right. In so doing, the court only cited to Florida cases involving state law and

did not mention due process or the United States Constitution. 517 So.2d at 668-69.[8]

Because the Florida Supreme Court did not pass upon appellant's federal due process claim, he cannot raise it here.

> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

*Webb v. Webb*, 451 U.S. at 495.

The Supreme Court of Florida did not pass upon any federal question in *Brackenridge*. Appellant's attempt to raise such a question before this Court should be rejected.

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8. By contrast, in *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987), decided the same day as *Brackenridge* and involving similar material facts, the Supreme Court of Florida addressed three questions certified to it by the Third District Court of Appeal. The first two of those questions were identical to those in *Brackenridge*. However, the third certified question explicitly involved the due process clause of the United States Constitution:

> III. Would the application of *Pullum*, to bar a cause of action that accrued after the *Battilla* decision but before the *Pullum* decision, deprive the plaintiff of a right of due process guaranteed by the United States Constitution?

515 So.2d at 1275. This federal constitutional issue was directly addressed and answered in the negative in *Clausell* by the Florida Supreme Court, which cited decisions by this Court and other federal courts holding that a cause of action is not a property right. 515 So.2d at 1275-76.

## CONCLUSION

A cause of action is not a vested property right; therefore, appellant does not raise a substantial federal question. Additionally, no federal question was pressed by appellant or passed upon by the Supreme Court of Florida. This appeal should be dismissed.

May 27, 1988

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of Ametek's Motion to Dismiss Appeal was mailed on May 27, 1988 to: George C. Vogelsang, Esq., The Vogelsang Law Firm, Attorneys for Brackenridge, 6701 Sunset Drive, Suite 102A, Miami, Florida 33143; Linda Koenigsberg, Fsq., Law Offices of James O. Nelson, Attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard; Miami, Florida 33131; and William G. Liston, Esq., Stephen R. Berger, P.A., Attorneys for Baring, 8525 S.W. 92 Street, Suite B-5, Miami, Florida 33156.

Ricardo Torres, Jr.

Supreme Court, U.S.
FILED
JUN 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1783

in the

# Supreme Court

of the

# United States

OCTOBER TERM, 1987

WILLIAM A. BRACKENRIDGE,

*Appellant,*

*vs.*

AMETEK, INC. and
BARING INDUSTRIES, INC.,

*Appellees.*

On Appeal from
The Supreme Court of Florida

## BARING INDUSTRIES, INC.'S MOTION TO DISMISS APPEAL

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## QUESTION PRESENTED

Whether the Supreme Court lacks jurisdiction to entertain this appeal.

## LIST OF ALL PARTIES

The proper appellees are AMETEK, INC. ("AMETEK") and BARING INDUSTRIES, INC. ("BARING"). The appellant is WILLIAM A. BRACKENRIDGE.

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## STATEMENT OF THE CASE

In this products liability action, Appellant alleged that he was seriously injured when his right arm was severed in a commercial laundry machine, the TROY MINUTEMART EXTRACTOR (the "extractor"), manufactured by AMETEK and distributed by BARING. The extractor was manufactured and delivered on or about August, 1967. In December, 1982, over fifteen years after delivery of the extractor, BRACKENRIDGE suffered the alleged injury. This lawsuit was commenced in December, 1984, more than seventeen years after the manufacture and delivery of the allegedly defective extractor. BARING asserted as an affirmative defense that BRACKENRIDGE's claim was time barred by the applicable statute of limitations. That statute, Section 95.032(2), more appropriately known as the statute of repose, absolutely bars products liability actions instituted more than twelve years after delivery of the allegedly defective product.

In 1985, during the pendency of this lawsuit, the Supreme Court of Florida, in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986) upheld the constitutionality of Section 95.031(2), the statute of repose barring this claim. In reaching this conclusion, the Florida Supreme Court "receded" from its previous decision in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980), and found that Section 95.031(2) does not unconstitutionally deny access to courts under Article I, Section 21 of the Florida Constitution. The Florida Supreme Court determined furthermore that the statute of repose constituted a proper and permissible exercise of a legislative prerogative:

> The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031(2) in his dissenting opinion in *Batilla*, correctly reasoned as follows:
>
> * * * *
>
> I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers.

*Pullum* at 659-60.

The Third District Court of Appeal in *Brackenridge v. Ametek, Inc.*, 503 So.2d 363 (Fla. 3d DCA 1987), and the Supreme Court of Florida in *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987) held that Appellant's cause of action in this case was barred by the statute of repose. The Florida Supreme Court, affirming the trial court's grant of summary judgment and approving the District Court's decision, rejected Appellant's contention that applying *Pullum* to his pending action deprived him of a property right.

## REASONS WHY APPEAL SHOULD BE DISMISSED

### I.

### BECAUSE APPELLANT HAS NO PROPERTY RIGHT IN HIS TORT CLAIM, NO FEDERAL DUE PROCESS QUESTION IS BEFORE THIS COURT AS A BASIS FOR JURISDICTION.

It is axiomatic that in order to be entitled to the procedural protections afforded by the due process clause of the Fourteenth Amendment, the complaining party must suffer from the deprivation of a liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985); *Beckham v. Harris*, 756 F.2d 1032 (4th Cir. 1985). In *Roth*, this Court stated that "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it—he must, instead, have a legitimate claim of entitlement to it". *Roth*, 408 U.S. at 577. Property interests are not created by the Constitution, but, rather are created and defined by existing rules or understandings that stem from an independent source, such as state law. *Roth*, 408 U.S. at 577. *See also, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Parratt v. Taylor*, 451 U.S. 527 (1981).

The sufficiency of a claim of entitlement to a benefit must be decided by reference to state law, *Bishop v. Wood*, 426 U.S. 341, 344 (1976) as evidenced by state statutes, local ordinances, rules, or mutually explicit understandings that support the claim. See *Perry v.*

*Sinderman*, 408 U.S. 593 (1972). The constitutional safeguards of the due process clause come into play only when such a property right clearly exists. *Roth*, 408 U.S. at 577.

In *Brackenridge*, 517 So.2d at 669, the Supreme Court of Florida determined that Appellant neither acquired nor was deprived of any property right. Because, therefore, the due process clause is not implicated here, Appellant has failed to invoke the jurisdiction of this Court.

## II.

## THIS COURT LACKS JURISDICTION BECAUSE APPELLANT HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant asserts as his basis for this appeal that retroactive application of *Pullum* to his claim unconstitutionally divested him of a protected property right in violation of the due process clause of Article XIV, Section 1 of the United States Constitution. *See* Appellant's Jurisdictional Statement at 7-8. As the Florida Supreme Court correctly determined in *Brackenridge*, 517 So.2d at 669, and according to well-settled principles of law, Appellant has no property right in his claim.

It is fundamental that no person has a property right or vested interest in any rule of common law entitling him to have such a rule of law remain unchanged for his benefit. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919). *See also Ducharme*

*v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978). ("It is well-settled that a plaintiff has no vested right in any tort claim for damages under state law").

As a corollary to his proposition, it is firmly established that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object". *Silver v. Silver*, 280 U.S. 117, 122 (1929).

Appellant mistakenly relies on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) to support his assertion that his cause of action is a constitutionally protected property right. Although this Court noted in *Logan* that "a cause of action is a species of property . . ." *Id.*, at 428, it also reaffirmed the constitutional prerogative of the state to create new or to eliminate existing causes of action.

> Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs. The Court held as much in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 533, 62 L.Ed.2d 481 (1980), where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity arguably did deprive the plaintiffs

> of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels.

*Id.* at 432-33.

Appellant's reliance on *Martinez v. State of California*, 444 U.S. 277 (1980) is equally misplaced. In *Martinez*, this Court determined that even if the plaintiff's cause of action for wrongful death created by the State of California was a "species" of property, the abolition of that cause of action through the application of the California immunity statute did not violate due process.

> Nor can the statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.
> (footnote omitted).

Further misconceived is Appellant's reliance on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Because *Chevron* is not a case of constitutional dimension, it cannot serve as a basis for arguing a substantial federal question. Although the issue presented in *Chevron* was whether the state statute of limitations should be retroactively applied to bar plaintiff's suit, the *Chevron* Court bottomed its decision not upon federal constitutional grounds, but upon a three-part balancing test.

The balancing test delineated in *Chevron* calls for the weighing of competing policy considerations in determining whether a rule should be given retroactive application.

Interestingly, two Florida Federal District Courts applying the *Chevron* test to facts analogous to the ones presented here have determined that retroactive application of *Pullum* is proper under *Chevron* and constitutionally permissible. *See Lamb v. Volkswagenwerk Aktiergesellschaft*, 631 F.Supp. 1144 (S.D. Fla. 1986); *Eddings v. Volkswagenwerk, A.G.*, 635 F.Supp. 45 (N.D. Fla. 1986). The courts in both *Lamb* and *Eddings* found that the *Chevron* test only applies to the retroactive application of a federal decision involving federal law, and not in cases, such as this, involving the retroactivity of a state law or decision. Both courts agreed this issue is purely one of state law. *See Lamb*, at 1151-52; *Eddings*, at 48. Both courts furthermore concluded that the plaintiffs had no property rights in their causes of action and that their federal constitutional rights were in no way abridged through the retroactive application of the statute of repose. *Lamb* at 1152; *Eddings* at 48.

Like the plaintiffs in *Lamb* and *Eddings*, Appellant in this cause had no property right in his claim and was, consequently, not subjected to any deprivation of due process as a result of the retroactive application of *Pullum*. Appellant has failed to present a substantial federal question. Accordingly, this Court lacks jurisdiction to entertain this appeal.

## III

## ADOPTION OF ARGUMENTS

Appellee adopts the arguments of co-appellee, AMETEK, as if fully set forth herein.

## CONCLUSION

Because Appellant had no property right in his cause of action, no due process considerations are implicated and no substantial federal question is presented here. Accordingly, this appeal should be dismissed.

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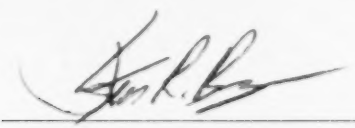
By 
Steven R. Berger

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 23rd day of June, 1988 to George C. Vogelsang, Esquire, The Vogelsang Law Firm, Attorneys for Brackenridge, 6701 Sunset Drive, Suite 102A, Miami, Florida 33143; David C. Pollack, Esquire, Ricardo Torres, Jr., Esquire, Stroock & Stroock & Levan, Attorneys for Ametek, Inc., 3300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2385; and Linda Koenigsberg, Esquire, Law Offices of James O. Nelson, Attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard, Miami, Florida 33131.

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